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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ROMAN GRIBBS, Mayor of the City of Detroit, et al.,
Petitioners,
v.
AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation,
Respondents.

— — —

ROMAN GRIBBS, Mayor of the City of Detroit, et al.,
Petitioners,
v.
NORTOWN THEATRE, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

American Mini Theatres, Inc., Pussy Cat Theatres of Michigan, Inc. and Nortown Theatre, Inc., Respondents, by and through their attorney, Stephen M. Taylor, respond to the Petition for a Writ of Certiorari; filed by Petitioners to review the judgment of the United States Court of Appeals for the Sixth Circuit in the captioned cases.

OPINIONS BELOW

The opinion of the Court of Appeals (App A, pp 15-39 is not reported. The opinion of the District Court (App D, pp 43-60) is reported at 373 F Supp 363.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (App B, pp 40-41) was entered on June 16, 1975. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

I.

WHETHER A ZONING AND LICENSING ORDINANCE WHICH DIFFERENTIATES BETWEEN MOTION PICTURE THEATRES BASED UPON THE CONTENT OF THE MOTION PICTURE FILMS INTENDED TO BE EXHIBITED ON THE PREMISES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND CREATES A PRIOR RESTRAINT UPON THE EXERCISE OF FREE SPEECH AND PRESS CONTRARY TO THE PROVISIONS OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Constitution of the United States

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

§1. Citizenship rights not to be abridged by states.

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

On the 2nd day of November, 1972, the City of Detroit enacted Ordinance No. 742-G and 743-G. (App G, pp 65-79, App H, pp 80-84) Section 32.0007 of Ordinance No. 742-G defines the terms "adult book store" and "adult motion picture theatre" as an establishment used to sell or exhibit press materials characterized by an emphasis on matter depicting "specified sexual activities" or "specified anatomical areas". "Specified sexual activities" is defined in that section of Ordinance No. 742-G to mean any sexual conduct or state of sexual arousal. "Specified anatomical areas" is defined in terms of the uncovered made or female genitals, pubic region, buttock, female breast, as well as the covered male genitals in a turgid state. (App G, pp 66-67) Section 66.0000 specifies the reason for, and definition of the term "regulated use" and categorizes certain commercial establishments as falling within the purview of that term, including adult book stores, adult motion picture theatres, Group "D" cabarets, any establishment where intoxicants are sold for consumption on the premises, hotels, motels, pool or billiard halls, second hand stores, shoe shine parlors, etc. Section 66.0000 prohibits the establishment of more than one regulated use within 1,000 feet of each other. (App G, pp 67-68) Section 66.0101 of Ordinance No. 742-G establishes a procedure whereby this prohibition may be waived by the City Plan Commission and establishes the standards to be applied by the City Plan Commission in granting or denying a waiver. (App G, p 68) Section 66.0103 of Ordinance No. 742-G provides that it is unlawful to establish an adult book store, adult motion picture theatre or Class "D" cabaret if the proposed location is within 500 feet of any building containing a residential dwelling or rooming unit. This prohibition may be waived by the City Plan Commission if a petition is filed, signed by 51% of those persons owning, residing, or doing business within 500 feet of the proposed location. Ordinance No. 742-G further specifies that the 1,000 foot prohibition shall not be waived by the City Plan Commission until the requirements of Section 66.0103 have been met. (App G, pp 69-70) Ordinance No. 743-G provides that it is unlawful to operate an adult motion picture theatre (as similarly defined in Ordinance No. 742-G) without complying with the requirements of the City Zoning Ordinance. Further the ordinance gives the mayor the power to refuse to grant or to revoke the license of an adult motion picture theatre. (App H, pp 80-82)

The Nortown Theatre, located at 7706 E. Seven Mile Road, Detroit, Michigan, had been operating as a motion picture since 1938 and had commonly been known in the City of Detroit as the Nortown Theatre for over 30 years and during that time had continuously exhibited motion picture films to the public on the premises. The Respondent, Nortown Theatre Incorporated, met all of the required health, safety and building standards, as specified by the Building and Safety Codes of the City of Detroit and on December 21, 1972, the Respondent obtained a general theatre license to operate a motion picture theatre on the premises. On March 1, 1973, the Respondent began operating the Nortown Theatre.

Respondents, American Mini Theatres, Inc., and Pussy Cat Theatres, Inc., lease and operate respectively a motion picture theatre at 16750 Telegraph Road, Detroit, Michigan. Respondents converted and renovated a corner gas station into a "mini" motion picture theatre and, on December 21, 1972, the building passed all health, safety

and building requirements of the Building and Safety Codes of the City of Detroit. On January 5, 1973, the Respondents began operating the premises as a motion picture theatre.

Soon after commencing operating the theatres, Respondents, Nortown Theatre, Inc., American Mini Theatres, Inc., and Pussy Cat Theatres, Inc., were notified by the Petitioners of the City of Detroit's intention to enjoin their operation under the State Zoning Enabling Act and the City Zoning Ordinances, to-wit: Ordinance No. 742-G. (App G, pp 65-79)

Following such notification, the Respondents filed separate actions seeking declaratory and injunctive relief in the Federal District Court, Eastern District of Michigan, Southern Division, pursuant to 42 USC 1983, claiming that their constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States were threatened by the proposed action of the various city officials, Petitioners herein. The jurisdiction of the court was invoked under 28 USC 1331 and 28 USC 1343 (3).

The District Court consolidated the cases for argument and, on March 22, 1974, issued an Opinion which upheld in part the ordinances in question. (App D, pp 43-60) Judgment was entered in the case styled *Nortown Theatre, Inc. v Gribbs, et al,* on April 25, 1974; (App E, pp 61-62), and in *American Mini Theatre, Inc., et al v Gribbs, et al,* on May 20, 1974 (App F, pp 63-64). Respondents appealed the decision to the Sixth Circuit Court of Appeals, and on June 16, 1975, the appellate court ruled that the two ordinances at issue were invalid under the Equal Protection clause of the Fourteenth Amendment. (App A, pp 15-39)

On July 18, 1975, pursuant to motion by the Petitioners, an Order Staying Mandate was issued by the Sixth Circuit Court of Appeals. (App C, p 42)

REASONS FOR DENYING THE WRIT

The decision of the Sixth Circuit Court of Appeals is clearly correct and is supported by extensive precedent and further there is no substantial federal question presented by the decision of the appellate court.

The ordinances in question differentiates between one kind of bookstore or theatre and another solely upon the content of the press materials intended to be sold or exhibited on the premises. "The operative distinction is the message on the picket sign. But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dept v Mosely*, 408 US 92. In the case at bar, the Nortown Theatre had been operated as a motion picture theatre and had continuously exhibited films for over 30 years. It was not until Respondent, Nortown Theatre, Inc., changed the motion picture films displayed on the premises to those of a sexually explicit nature that Respondent fell within the regulatory purview of the ordinances in question. "The regulation 'thus slip(s) from the neutrality of time, place and circumstance into a concern about content.' This is never permitted." *Police Dept v Mosely, supra,* at 99.

Since the ordinances by their terms and as applied, differentiate between press materials based upon content which have not been found to be obscene at a prior adversary on the issue of their obscenity, said materials are pre-

sumptively protected by the First Amendment. Where fundamental rights and liberties are asserted under the equal protection clause, the test to be applied to the statutory classification under attack is whether it is " . . . *necessary* to the achievement of a *compelling* state interest." *Eisenstandt v Baird,* 405 US 438, 447, Note #7. The Petitioners have asserted that "deleterious effects on a neighborhood are caused by . . . theatres and bookstores . . . only . . of an 'adult' nature The separate classification and treatment of 'adult' theatres and bookstores is necessary . . . because of the ill effects on the neighborhood caused by the establishment and operation of those businesses, which effects are not caused by 'non-adult' businesses." The United States Supreme Court recently struck down an ordinance which discriminated amongst movies solely on the basis of content. In *Erznoznik v City of Jacksonville,*——US——, 45 L Ed 2d 125, the court said that, "although each case ultimately must depend upon its own special facts, some general principles have emerged . . . when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." There, the municipality asserted that the ordinance was intended to protect the right of privacy of its citizens from unwilling exposure to materials that may be offensive; here the Petitioners assert their intention to protect a neighborhood from deleterious or adverse effects which are caused by the establishment and operation of so-called "adult" businesses. In *Erznoznik v City of Jacksonville, supra,* the municipality was unable to justify the ordinance on the basis of a competing claim of privacy which has always been recognized as, " . . . plainly rooted in the traditions and significant concerns of our society . . . " If the assertion of countervailing rights of privacy are insufficient to overcome the preferred position of free speech and press, it then follows that unproven and undifferentiated fears of a potential evil such as the alleged adverse effects arising from the establishment of an "adult" business are unavailing as the requisite "compelling state interest" necessary to overcome the Petitioners' heavy burden of justification. Were the court to hold otherwise, this " . . . authority would effectively employ a majority to silence dissidents simply as a matter of personal predelictions." *Cohen v California,* 403 US 15, 21. Thus, the alleged ill effects on neighborhoods ". . . cannot justify . . . censorship of otherwise protected speech on the basis of its contens." *Erznoznik v City of Jacksonville, supra,* at 132, Note #9, "We are not concerned in this case with a properly drawn zoning ordinance restricting the location of . . . theatres or with a nondiscriminatory nuisance ordinance designed to protect the privacy of persons in their homes from . . . visual and audible intrusions. . . . " The analysis of the Sixth Circuit Court of Appeals that the ordinances in question are invalid under the Equal Protection Clause of the Fourteenth Amendment is correct.

The Appellate Court said, "Believing as we do that the two ordinances under consideration in this case are invalid under the equal protection clause of the *Fourteenth Amendment,* we will pass to a discussion of that issue without dwelling on the due process challenges, . . . [vagueness or overbreadth or failure to provide for speedy judicial determination of the validity of the particular restraint applied] . . ." (App A, p 25). Though the Court felt it unnecessary to consider whether the ordinances violated the *First* and *Fourteenth Amendments* on grounds other than Equal Protection, those grounds are available to support the decision of the Sixth Circuit Court of Appeals in striking down the ordinances in question.

It is no longer open to question that motion picture films are a means of expression protected by the *First Amendment. Joseph Burstyn, Inc v Wilson,* 343 US 495; *Jenkins v Georgia,* 418 US 153. And the setting of a commercial motion picture theatre exhibiting motion picture films is equally entitled to those same protections. *Roaden v Kentucky,* 413 US 496. The ordinances, by their terms, place a burden upon the establishment of a motion picture theatre in a particular place. Whether the theatre must meet the requiremnts of the ordinances in question depends upon whether "adult" films as defined in the ordinances are intended to be exhibited on the premises. Thus, the burden is imposed at a particular location because of what is intended to be exhibited at some time in the future at that location.

The ordinances sweep far beyond the permissible restraints on obscenity and thus applies to films that are protected by the *First Amendment. Miller v California,* 413 US 15; *Erznoznik v City of Jacksonville, supra.* The ordinances in question have created a system whereby a third category of press materials is subject to regulation. The press materials are not deemed to be obscene and therefore unprotected. Nor are they deemed to be fully protected by the free speech and press provisions of the *First Amendment.* The press materials which would fall within the regulatory purview of the ordinances are defined as "adult" materials and for certain specified reasons, are said to be "objectionable" and therefore subject to regulation. This is justified by petitioners on the grounds that the ordinances regulate but do not totally prohibit the objectionable press materials. However, this Court disposed of petitioners basic premise that, "The challenged city ordinances regulated the *location* of adult businesses, but do not prohibit them, nor censor the con-

tent once the business has been established," in *Southeastern Promotions, Ltd v Conrad,* 420 US 546, where the Court said " . . . It does not matter . . . that the board's decision might not have had the effect of total suppression of the musical in the community." The Court then stated at note no. 8:

> "Also important, though unessential to our conclusion, are the classificatory aspects of the Board's decision. A licensing system need not effect total suppression in order to create a prior restraint. In Interstate Circuit v Dallas, 390 US 676, 688, 20 L Ed 2d 225, 88 S Ct 1298 (1968), it was observed that the evils attendant on prior restraint 'are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression.' In that case, the Court held that a prior restraint was created by a system whereby an administrative board in Texas classified films as 'suitable for young persons' or 'not suitable for young persons.' The 'not suitable' films were not suppressed, but exhibitors were required to have special licenses and advertise their classification in order to show them. Similarly, in Bantam Books, Inc v Sullivan, 372 US 58, 9 L Ed 2d 534, 83 S Ct 631 (1963), the Court held that a system of 'informal censorship' working by exhortation and advice sufficiently inhibited expression to constitute a prior restraint and warrant injunctive relief. There, the Court held unconstitutional a system in which a commission was charged with reviewing material 'manifestly tending to the corruption of the youth'; it did not have direct regulatory or suppressing functions, but operated by

persuasion and intimidation, and these informal methods were found effective."

. . .

That speech which is presumptively protected by the *First Amendment* is fully protected, and this protective umbrella is not subject to qualification. The ordinances thus are overbroad and violative of the *First* and *Fourteenth Amendments* for they bring within their regulatory purview protected as well as unprotected speech. When such an overborad ordinance is used and applied to proscribe future speculative activity *i.e.,* what is intended to be exhibited at a theatre which itself is intended to be established, no adequate safeguards—in the form of prior adversary hearings—are afforded for press materials which might be non-obscene and thus protected by the *First Amendment.* " . . . A state is not free to adopt whichever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus v Search Warrant,* 367 US 717, at p 731. Yet assuming *arguendo* petitioners could somehow justify a third category of speech, whatever the standard to be applied, the ordinances in question must, "afford appropriate procedural safeguards." . . . The standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimal restriction of *First Amendment* rights . . ." *Southeastern Promotions Ltd v Conrad, supra,* at p 562. In that case this Court reiterated its position with regard to any system of prior restraint, stating:

> " . . . None of the cimcumstances qualifying as an established exception to the doctrine of prior restraint was present. Petitioner was not seeking to use a facility primarily serving a competing use.

> . . . Nor was rejection of the application based on any regulation of time, place, or manner related to the nature of the facility or applications from other users.
>
> . . . No rights of individuals in surrounding areas were violated by noise or any other aspect of the production.
>
> . . . There was no captive audience.
>
> . . . Whether petitioner might have used some other privately owned, theatre in the city for the production is of no consequence . . . Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' Schneider v State, *supra,* 308 US at 163, 84 L Ed 155.
>
> Thus, it does not matter for purposes of this case that the Board's decision might not have had the effect of total suppression of the musical in the community . . .
>
> . . . Labelling respondents' action a prior restraint does not end the inquiry. Prior restraints are not unconstitutional per se.
>
> . . . Any system of prior restraint, however, "comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc v Sullivan, *supra,* 372 US at 80, 9 L Ed 2d 534; . . .
>
> The presumption against prior restraints is heavier—and the degree of protection broader—than

that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.

In order to be held lawful, respondents' action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, it must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech.

The settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.' Freedman v Maryland, 380 US 51, 58, 13 L Ed 2d 649, 15 S Ct 734 (1965).

. . . In Freedman the Court struck down a state scheme for the licensing of motion pictures, holding 'that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.' 380 US, at 58, 13 L Ed 2d 649. We held in Freedman, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safe-

guards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

. . . Insistence on rigorous procedural safeguards under these circumstances is 'but a special instance of the larger principle that freedoms of expressions must be ringed about with adequate bulwarks.' Bantam Books, Inc v Sullivan, *supra*, 372 US at 66, 9 L Ed 2d 584. Because the line between unconditionally guaranteed speech and speech that they may be legitimately regulated is a close one, the 'separation of legitimate from illegitimate speech calls for . . . sensitive tools.' "

Virtually none of the requisite procedural safeguards can be found in the body of the ordinances in question. Whatever the reasons may have been for enactment of the ordinances there is no " . . . escape [from this] . . . obligation . . ." *Southeastern Promotions Ltd. v. Conrad, supra,* at p 562.

Applying those principles to the ordinances in question, there can be no doubt that the decision of the Sixth Circuit Court of Appeals followed a long line of precedent established by this Honorable Court since the terminal case of *Near v Minnesota,* 283 US 697 and reasserted by this Court just last term in the two cases of *Southeastern Promotions, Ltd v Conrad, supra* and *Erznoznik v City of Jacksonville, supra.*

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: September 5, 1975.